YAAKUB FOONG ABDULLAH

v.

LAI MUN KEONG & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 204 OF 1983
12 JANUARY 1986

DAMAGES: *Quantum - Loss of earnings - Lack of evidence as to monthly earnings - Work in contravention of permit - Illegal earnings - Future loss of earnings - Murtadza's case - Treatment in private hospitals.*

The plaintiff was on his motorcycle when he was run into by the 1st defendant. The plaintiff is now claiming damages for the injuries he sustained. Liability is admitted and special damages have been agreed at RM1,560 excluding the claim for loss of earnings. The plaintiff suffered a posterior dislocation of the left hip joint with a fracture of the acetabulum. Medical opinion showed that standing and walking, especially if it involved carrying weights, would get progressively painful and squatting would be difficult. In time, the plaintiff would probably require a replacement of the left hip joint with prosthesis. Under the head of pain and suffering and loss of amenities for the dislocation and the fracture, RM25,000 was awarded and RM10,000 for the cost of the total hip replacement. The contentious area here was the quantum of the plaintiff's earnings.

Held:

[1] A claimant is entitled to have himself treated in a private hospital if in all the circumstances that is not an unreasonable thing for him to do.

[2] There was no cogent evidence of the precise amount of tax payable by the plaintiff. In fact, no income tax returns were produced and not one of the plaintiff's various employers were called to support the plaintiff's testimony as to his earnings. The Statements from the CPF Board dated 25 November 1982 also cannot be reconciled with the plaintiff's claim for monthly earnings.

[3] The plaintiff has admitted that the additional work that he performed outside at night was in contravention of his work permit. The Court disagrees with plaintiff's Counsel's submission that it is irrelevant for this Court to concern itself as to whether the plaintiff paid tax in Singapore or whether his earnings were in contravention of his work permit.

[4] It is too well established that the plaintiff's pecuniary loss must be computed after taking into account deductions which would have been made on his earnings by way of tax, in cases where his damages will not subject to tax in his hands. Furthermore, it is well established that *ex turpi causa non oritur actio.* It is no part of a Court's function to compensate a plaintiff for profits which he would have made from an illegal activity had he not been injured. (The observations in *Kang Bark Teng & Anor. v. Lee Kwee Lim & Anor.* [1952] 18 MLJ 27 and *Tan Chooi Thin (w) & Anor. v. Teo Wee Hong* [1953] 19 MLJ 203 are clearly obiter).

[5] The plaintiff is a Malaysian citizen. It must be a matter of concern for this Court that Malaysian nationals should be discouraged from abusing the privileges of host countries when they go abroad. The proximity of Singapore to the Federation must make this observation doubly significant.

[6] On the evidence, the figure of RM350 per month was taken as representing the monthly loss to the plaintiff. From the date of accident up till date of judgment, he will consequently be awarded 42 months' loss of earnings which yield RM14,700.

[7] For future loss of earnings, *Murtadza's* case [1980] 1 MLJ 216 was considered and in instant case 55 years was taken as the end of the plaintiff's useful working life. Therefore a further 6 months was given for future loss of earnings, that is, RM2,100.

[8] Interest was awarded at the rate of 4% on special damages from date of service of writ up to date of judgment and 8% p.a. on general damages also from the date of service of the writ.

[9] From date of judgment up to realisation, interest was awarded at the rate of 8% on the global sum.

[Plaintiff's costs to be taxed and paid by defendants.]

Cases referred to:
Kang Bark Teng & Anor. v. Lee Kwee Lim & Anor. [1952] 18 MLJ 27
Tan Chooi Thin (w) & Anor. v. Teo Wee Hong [1953] 19 MLJ 203
Murtadza's case [1980] 1 MLJ 216

For the plaintiff - Jegatheeson; M/s. John Ang & Jega
For the defendants - M. Varughese; M/s. Varughese & Co.

JUDGMENT

Mahadev Shankar J:

Until 26 July 1982 the plaintiff who was then 51 years old, was a sawyer. He claims to have been dealing with timber logs for more than 20 years, having started work as such in Singapore in 1965.

He is now claiming for damages for the injuries he sustained. Liability is admitted. The special damages have been agreed at RM1,560 excluding the claim for loss of earnings.

The plaintiff was on his motorcycle when he was run into by the 1st defendant. He did not lose consciousness. There were no external injuries but on hospitalisation the same day, x-rays showed posterior dislocation of the left hip joint with a fracture of the acetabulum. He remained in the General Hospital in Johore Bahru until 10 August 1982 when he was transferred to the Singapore General Hospital where on 16 August 1982 the fracture in his hip was reduced and fixed in place with a screw. He was discharged from the Hospital on 5 September 1982. On 1 March 1983 he was seen by Dr. Thambyrajah of the Johore Specialist Hospital. *Inter alia,* the muscles of the left lower limb were found to be weaker than those on the right and the head of the femur was found to be undergoing avascular necrosis. The medical opinion was this would cause a painful left hip which would get progressively worse. Standing and walking, especially if it involved carrying weights, would get progressively painful and squatting was already difficult then could get impossible in time to come. The plaintiff is not able to climb stairs. The prognosis was that in time to come he would require a replacement of the left hip joint with prosthesis.

Having taken into consideration the various authorities cited by Counsel on the proper award under the head of Pain and Suffering and Loss of Amenities for the dislocation and the fracture, I award a figure of RM25,000. Dr. Thambyrajah has stated that the cost of the total hip replacement is about RM9,000 and that the period of rehabilitation following surgery may take about 2 months. I consider it reasonable to award a round figure of RM10,000 under this head.

Defence Counsel is insistent that the plaintiff should get himself treated in the Government Hospital in Johore Bahru because it is cheaper by half. As to this, it is my view that a claimant is entitled to have himself treated in a private hospital if in all the circumstances that is not an unreasonable thing for him to do.

The contentious area here was the quantum of the plaintiff's earnings.

In his examination-in-chief he stated that he had started working in Singapore in 1965 for various companies. In 1977 it was for Hong Huat Company. In 1979 it was with Soong Guan Co. in Sabah. In 1980 he resumed with Hong Huat Company. On 5 May 1982 he started with Chye Lian Huat. Here he claimed he earned RM800 per month on an average. The working hours were from 7.30 a.m. to 5.00 p.m. In addition to his salary he claims he earned commission on the amount of timber sawn and the standard rate was RM15 to RM16 per ton. In addition he claimed he did night work for 12 days per month from 6.00 p.m to 9.00 p.m. for which he was paid RM20 per night on a daily basis. The average earning for night work per month was RM220 to RM250. Total estimated earnings per month was RM1,030. Between 25 May 1982 up to 23 July 1982 when he met with the accident, he was working on a lump sum contract with Earnest Trading Co. Ltd. Payment was made on the basis that he was a contractor and the lump sum was RM3,572. The work was required to be performed in Pekan Baru in Indonesia and at the time of the accident in Johore Bahru the plaintiff claimed that he was on a holiday.

Not one of his employers was called to support this testimony. No income tax returns were produced. In fact the plaintiff admitted that he did not pay any income tax. Whilst he was working for Chye Lian Huat, the plaintiff admits that the additional work that he performed outside at night was in contravention of his work permit.

The plaintiff did not at any time withdraw any money from his CPF. Yet the total balance in his ordinary account on 1 January 1982 was only RM1,489.20. The contribution for that year was RM315.50. With interest the balance on 1 January 1983 in the ordinary account was RM1,908.46. The CPF Board Statement dated 25 November 1982 discloses that the current quarter contribution at that time was RM80, and that the last contribution received from Chye Lian Huat Sawmill Co. on 8 November 1982 for October 1982 was RM40. These figures cannot be reconciled with the plaintiff's claim for monthly earnings in excess of RM1,000.

Plaintiff's Counsel submits that it is irrelevant for this Court to concern itself as to whether the plaintiff paid tax in Singapore or whether his earnings were in contravention of his work permit.

With respect I am unable to agree.

It is too well established that the plaintiff's pecuniary loss must be computed after taking into account deductions which would have been made on his earnings by way of tax, in cases where his damages will not be subject to tax in his hands. Furthermore, it is well established that *ex turpi causa non oritur actio.* It is no part of a Court's function to compensate a plaintiff for profits which he would have made from an illegal activity had he not been injured. Mr. Jegatheeson has quoted two cases in support of his view. In *Kang Bark Teng & Anor. v. Lee Kwee Lim & Anor.* [1952] 18 MLJ 27 the Singapore High Court declined to have regard to the fact that the deceased was an unlicensed pork seller. Notwithstanding that his business was committed in breach of the Municipal Ordinance, the Court nevertheless struck a balance between the alternative possibility of the law being repealed and the law being strictly enforced i.e. in considering the deceased's position from one of stability to one where he could be driven out of business altogether. *Tan Chooi*

Thin (w) & Anor. v. Teo Wee Hong [1953] 19 MLJ 203 is another case where the Court declined to take into account the fact that the deceased was alleged to be deriving some income from private trading by importing and exporting precious stones in contravention of the Customs Legislation. In fact there was no evidence from which the Court could make such a finding but nevertheless Buhagiar J held that even if the allegation was a fact, he did not think that the profits made from that business could be excluded in reckoning the deceased's earnings.

The observation was clearly obiter.

The plaintiff is a Malaysian citizen. It must be a matter of concern for this Court that Malaysian nationals should be discouraged from abusing the privileges of host countries when they go abroad. The proximity of Singapore to the Federation must make this observation doubly significant.

Consequently I would state it as the view of this Court that if there had been cogent evidence before me as to the precise amount of the tax payable by the plaintiff and of the amount which he had illegally earned in contravention of his work permit, I would have discounted the damages arithmetically due to the plaintiff on both counts.

However this is a case, where the CPF returns clearly show that the plaintiff has grossly exaggerated what he was really earning. I agree with Mr. Varughese that it is unsafe to find that the plaintiff earned more than RM300 to RM400 per month at best. Consequently I propose to take the figure of RM350 per month as representing the monthly loss to the plaintiff. From the date of the accident up till today, he will consequently be awarded 42 months loss of earnings which at RM350 per month yields RM14,700.

For future loss of earnings, Mr. Varughese says that nothing should be awarded beyond the age of 55 and he relies on *Murtadza's* case [1980] 1 MLJ 216. I had the benefit of ingesting the comments of Chang Min Tat FJ at p. 218H and I am of the view that for the reasons there stated 55 years represents the end of the plaintiff's useful working life in this particular case. It has to be remembered that this plaintiff was found to have ischaemic heart disease when he was in hospital. At the date of the trial in May 1985 he was 54 years old. I would therefore give him a further loss of earnings i.e. RM2,100. So I award interest at the rate of 4% on the special damages of RM16,260 from the date of the service of the writ up to the date of judgement, and at the rate of 8% per annum on the general damages of RM37,100 also from the date of the service of the writ.

As from the date of judgement up to realisation, interest will run at the rate of 8% on the global sum I have awarded up to realisation.

The plaintiff will also have his costs to be taxed and paid by the defendants.

Also found at [1986] 1 CLJ 355

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